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CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> . . . [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb; . . .

The Fourteenth Amendment to the United States Constitution, § 1, provides in pertinent part:

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law; . . .

STATUTES INVOLVED

Ark. Stat. Ann. § 41-1001 (Repl. 1977) provided as follows:

> (1) A defendant who is convicted of a felony committed and who has previously been convicted of more than one (1) but less than four (4) felonies, or who has been found guilty of more than one (1) but less than four (4) felonies, may be sentenced to an extended term of imprisonment as follows:
>
> . . .
>
> (b) not less than five (5) years nor more than thirty (30) years, if the conviction is of a class B felony;
>
> . . .
>
> (2) A defendant who is convicted of a felony and who has previously been convicted of four (4) or more felonies, or who has been found guilty of four (4) or more felonies, may be sentenced to an extended term of imprisonment as follows:
>
> . . .
>
> (b) not less than twenty (20) years nor more than forty (40) years, if the conviction is of a class B felony;
>
> . . .

(3) For the purpose of determining whether a defendant has previously been convicted or found guilty of two (2) or more felonies, a conviction or finding of guilt of burglary and of the felony that was the object of the burglary shall be considered a single felony conviction or finding of guilt. A conviction or finding of guilt of an offense that was a felony under the law in effect prior to the effective date [January 1, 1976] of this Code shall be considered a previous felony conviction or finding of guilt.

Ark. Stat. Ann. § 41-1003 (Repl. 1977) provided as follows:

A previous conviction or finding of guilt of a felony may be proved by any evidence that satisfies the trier of fact beyond a reasonable doubt that the defendant was convicted or found guilty. The following are sufficient to support a finding of a prior conviction or finding of guilt:

(1) a duly certified copy of the record of a previous conviction or finding of guilt by a court of record; or

(2) a certificate of the warden or other chief officer of a penal institution of this state or of another jurisdiction, containing the name and fingerprints of the defendants, as they appear in the records of his office; or

(3) a certificate of the chief custodian of the records of the United States Department of Justice, containing the name and fingerprints of the defendant as they appear in the records of his office.

Ark. Stat. Ann. § 41-1003 (Supp. 1981) [recodified as Ark. Code Ann. § 5-4-504 (1987); the previous section as amended by 1981 Ark. Acts 252, § 1, with new matter italicized], provides as follows:

(a) A previous conviction or finding of guilt of a felony may be proved by any evidence that satisfies

the *trial court* beyond a reasonable doubt that the defendant was convicted or found guilty.

(b) The following are sufficient to support a finding of a prior conviction or finding of guilt: . . .

Ark. Stat. Ann. § 41-1005 (Repl. 1977) provided as follows:

The following procedure shall govern trials at which a sentence to an extended term of imprisonment is sought pursuant to Section 1001 [§ 41-1001]:

(1) The jury shall first hear all evidence relevant to the felony with which defendant is currently charged and shall retire to reach a verdict of guilt or innocence on this charge.

(2) If the defendant is found guilty of the felony, the same jury shall sit again and hear evidence of the defendant's previous felony convictions or previous findings of the defendant's guilt of felonies. Defendant shall have the right to hear and controvert such evidence and to offer evidence in his support.

(3) The jury shall retire again, and if it finds that the defendant has previously been convicted or found guilty of two (2) or more felonies, the jury shall consider the previous convictions or findings of guilt in determining the sentence to be imposed for the felony of which the defendant currently stands convicted.

Ark. Stat. Ann. § 41-1005 (Supp. 1981) [recodified as Ark. Code Ann. § 5-4-502 (1987); the previous section as amended by 1981 Ark. Acts 252, § 3, with new matter italicized], provides as follows:

The following procedure shall govern trials at which a sentence to an extended term of imprisonment is sought pursuant to Section 1001 [§ 41-1001]:

(1) The jury shall first hear all evidence relevant to the felony with which defendant is currently charged and shall retire to reach a verdict of guilt or innocence on this charge.

(2) If the defendant is found guilty of the felony, the *trial court, out of the hearing of the jury,* shall hear evidence of the defendant's previous felony convictions or previous findings of the defendant's guilt of felonies *and shall determine the number of prior felony convictions, if any. Defendant shall have the right to hear and controvert such evidence and to offer evidence in his support.*

(3) The trial court shall then instruct the jury as to the number of previous convictions and the statutory sentencing range. The jury may be advised as to the nature of the previous convictions and the date and place thereof. The jury shall retire again and then determine a sentence within the statutory range.

STATEMENT OF THE CASE

A. Proceedings Below

Respondent, Johnnie Lee Nelson, is a petty thief with a criminal history going back to 1960.[1] The case that brings us here is Union County, Arkansas, Circuit Court Case No. CR79-22 where he was first convicted in 1980 of the felony breaking and entering into a vending machine and misdemeanor theft of property of $45.00. His prior convictions required that he be sentenced as an habitual offender under Arkansas law. He was originally tried and sentenced by a jury to 40 years on the burglary charge

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[1] Nelson's criminal record, all in Union County Circuit Court, is as follows:

Date	Case No.	Charge	Disposition
1-26-60	9065	Grand Larceny	1 yr.
4-5-60	9078*	Assault w/i rape	14 yrs.— PARDONED
4-5-60	9090	Robbery	7 yrs.
8-31-72	11194*	Poss. Stolen Prop.	18 mo. suspended
8-31-72	11213*	Poss. Stolen Prop.	18 mo. suspended
7-30-73	11604	Misd. Trespassing	1 yr. suspended
8-22-74	CR74-89	Revocation in 11604 (Misd)	53 days with credit for 43 days
7-25-74	CR74-137*	Burglary & G. Larceny	21 years w/10 susp.
7-22-80	CR79-22	Burglary & Misd. Theft	40 years burg., 1 yr. theft-REV'D
3-12-82	CR79-22	" (on remand)	20 years

Convictions marked with an asterisk (*) were used here to enhance the sentence. The last conviction is the proceeding at issue here.

It should be noted that the three 1960 convictions predate *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), requiring that counsel be appointed for those who cannot afford it. If the record is silent on whether counsel was present, those convictions cannot be used against him. *Burgett* v. *Texas*, 389 U.S. 109 (1967); *Boykin* v. *Alabama*, 395 U.S. 238 (1969).

and one year concurrent on the theft charge. That conviction was reversed by the Arkansas Supreme Court. *Nelson* v. *State*, 274 Ark. 113, 622 S.W.2d 188 (1981)

Respondent's case was remanded to the Union County Circuit Court, but this time he pled guilty to the charges but requested that a jury determine his sentence.[2]

All his sentencing, Nelson told his lawyer that he had been pardoned on his 1960 assault to commit rape conviction that the state sought to use against him, but his lawyer made no objection. In fact, defense counsel erroneously agreed with the prosecutor that Nelson only obtained a commutation of that conviction.[3] The court and the prosecutor heard Nelson's statement to counsel on the pardoned prior but the prosecutor argued that Nelson was mistaken, and that he only received clemency. The court decided to permit the State to use it anyway. The jury thus heard of the four prior convictions, but was given no option for finding any lesser number. The jury sentenced Nelson only to the minimum possible sentence with four priors: twenty years.

Nelson then appealed the use of the prior pardoned conviction to enhance his sentence. In an unpublished opinion the Arkansas Court of Appeals held that since no objection was made by defense counsel, the court would

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[2] Arkansas is only one of about five states which still use jury sentencing except where the jury is waived. Ark. Stat. Ann. § 41-802 (Repl. 1977) (recodified as § 5-4-103 (1987)).

[3] Nelson was explicit that he was pardoned on the conviction, but the prosecutor argued to the trial court that it was only a commutation by Governor Faubus and not a pardon. In a leading question, the trial court asked Nelson whether the sentence was reduced to time served. Nelson agreed with this, and the court then held that Nelson had not been pardoned. App. 11-12.

not consider the issue on appeal. (The State, of course, resisted the contention that Nelson had been pardoned.) It was accordingly suggested that Nelson seek post-conviction relief. *Nelson* v. *State*, Ark. App. No. CACR 83-150 (May 2, 1984; unpublished). App. 13.

Acting *pro se*, Nelson petitioned the Arkansas Supreme Court for post-conviction relief. That court held that his "bare assertion" he was pardoned was not a sufficient basis to grant relief. *Nelson* v. *State*, Ark. S.Ct. No. CR 84-133 (Nov. 19, 1984; unpublished). App. 15.

> Petitioner has presented nothing in this petition beyond the bare assertion that there was a pardon to indicate that he was not correct in his testimony that the governor commuted the sentence but did not issue a pardon.
>
> Petition denied.

App. at 18.

Again acting *pro se*, Nelson then sought relief in the United States District Court for the Eastern District of Arkansas by filing a petition for writ of habeas corpus on January 25, 1985 alleging, *inter alia*, that he had been pardoned on one of the priors used against him. The State responded to the petition, alleging then for the fourth time in three years that Nelson only had his sentence commuted and not pardoned. *Nelson* v. *Lockhart*, 641 F.Supp. 174, 175 (E.D. Ark. 1986).

On July 26, 1985, however, Chief U.S. District Judge Eisele wrote to the Attorney General's Office and requested that they determine whether Nelson had, in fact, been pardoned for the 1960 assault to commit rape conviction. App. 3. Eighteen days later, the State filed a supplemental pleading in response to the district court's letter, and it stated that Nelson was, in fact, pardoned. *Id.*

A copy of the pardon was filed with the district court. App. 6.

On September 20, 1985, the district court issued an order stating that Nelson's trial counsel was ineffective at Nelson's 1983 sentencing trial for not making an objection at Nelson's request on the ground Nelson had been pardoned because, under *Duncan* v. *State*, 254 Ark. 449, 494 S.W.2d 127 (1973), a pardoned conviction could not be used to enhance a sentence in habitual offender sentencing proceedings in Arkansas. Before the court would grant the writ and order resentencing which could have resulted in a longer sentence, however, counsel was appointed "to advise the petitioner of his legal rights and, in particular, to confer with him about the risks of going forward in view of the possibility that resentencing petitioner might result in his receiving a sentence of in excess of twenty years." *Nelson* v. *Lockhart*, *supra*, 641 F.Supp. at 175-76.

The district court further stated, *id.*, at 176:

> The state subsequently expressed, through a letter to the Court, its intention to resentence the petitioner. This raised the prospect that the petitioner might well receive a longer sentence than the one rendered invalid by the pardon, since petitioner had other prior felony convictions not offered or introduced at the initial sentencing, and since he had received the minimum sentence within a wide possible range. Assuming that the state would be allowed to resentence the petitioner and that the state would then introduce other prior felony convictions not introduced in the previous sentencing proceeding, his attorney counseled petitioner against pursuing the habeas claim. Counsel reported to the Court that he had so advised his client but that the petitioner nevertheless desired to continue the case. Shortly thereafter the Court issued another order in which it

> indicated that if, after conferring with his counsel again, petitioner still wished to go forward, the Court would require the petitioner to appear so that the Court could satisfy itself that the petitioner understood the possible consequences of his decision. Prior to the date of any hearing, however, petitioner's counsel brought to the Court's attention the possibility that the state might be entirely barred from resentencing the petitioner as an habitual offender upon the present conviction.
>
> Petitioner has raised a very serious issue which warrants careful re-examination of the case in light of the Double Jeopardy Clause of the Fifth Amendment. Having completed this re-examination, the Court now concludes that its earlier expressions suggesting that the state would be able to resentence the petitioner were erroneous. The Court now finds that the Writ of Habeas Corpus must be granted because the state failed to satisfy the evidentiary requirements necessary to sentence the petitioner as an habitual offender under Arkansas law. Ark. Stat. Ann. § 41-1001. The Court also finds that the Double Jeopardy Clause prevents the state from resentencing the petitioner under that law.

The district court held that the State was barred from resentencing Nelson as an habitual offender, relying on *Bullington* v. *Missouri*, 451 U.S. 430 (1981), and *Burks* v. *United States*, 437 U.S. 1 (1978), because of the trial-like qualities of the habitual sentencing procedure in Arkansas and the requirement of proof of prior convictions beyond a reasonable doubt under former Ark. Stat. Ann. §§ 41-1003 & 41-1005. *Nelson* v. *Lockhart*, *supra*, 641 F.Supp. at 178-81. The district court further held that this was no mere trial error; it was a fundamental failure of proof at trial and on appeal because the pardoned conviction was a nullity. *Id.* at 181-85. In its holding, the district

court followed Fifth Circuit cases in accord,[4] and it held that the law must treat the failure of proof at the enhancement stage as an effective acquittal on that part of the case. *Id.* at 185-86. The writ was thus granted directing the State to elect whether to resentence Nelson or accept reduction to the minimum sentence, as is the Arkansas practice. Nelson was released by the district court on bond in June 1986 pending appeal since he had already served six years and would have shortly been eligible for parole even on the 20 year sentence. (He is working and living a productive life and has not been in trouble since.)

The Eighth Circuit affirmed. *Nelson* v. *Lockhart*, 828 F.2d 446 (8th Cir. 1987). The Court of Appeals agreed with the district court that the State's failure to prove four priors because one prior had been pardoned at a separate trial on the issue of sentencing barred resentencing Nelson as an habitual offender under *Bullington* v. *Missouri*, *supra*. The Court of Appeals distinguished the line of cases holding that trial error does not invoke the protection of the Double Jeopardy Clause of the Fifth Amendment; *see*, *e.g.*, *United States* v. *Tateo*, 377 U.S. 463, 465 (1964); because, here, the State simply failed in its proof of four prior convictions. Therefore, under *Burks*, the State could not be given another opportunity to supply the missing proof. *Nelson* v. *Lockhart*, *supra*, 828 F.2d at 448. The Court of Appeals also followed the Fifth Circuit's cases. *Id.* at 450. The Court of Appeals

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[4] *Bullard* v. *Estelle*, 665 F.2d 1347 (5th Cir. 1982); *French* v. *Estelle*, 692 F.2d 1021 (5th Cir. 1982), *vacated on other grounds* 459 U.S. 1139, *on remand* 708 F.2d 1020 (5th Cir. 1983); *Briggs* v. *Procunier*, 764 F.2d 368 (5th Cir. 1985).

Maybe *contra* was *Linam* v. *Griffin*, 685 F.2d 369 (10th Cir.(, *cert. denied*, 459 U.S. 1211 (1982) (such an error is a mere trial error in that case under state law).

followed the district court and Arkansas law and ordered Nelson's sentence reduced to the minimum of three years to remove any prejudice if the state elects not to resentence him. *Id.* at 451 n.9.

The State sought and obtained this petition for writ of certiorari.

B. Habitual Offender Sentencing In Arkansas

Under Arkansas law, as it is everywhere else, habitual offenders may be subjected to extended terms of imprisonment. Arkansas has had habitual offender sentencing since 1953, and it has used the current two-step process since 1975.[5] The first level is "more than one but less than four felonies," and it increases the maximum sentences only, in some cases fifty percent, in others less. Ark. Stat. Ann. § 41-1001(1) (Repl. 1977 & Supp. 1985) (recodified as Ark. Code Ann. § 5-4-501(a) (1987)). The second level is "four or more felonies." For habitual offenders within this category, the maximum term of imprisonment ordinarily allowable for that level of offense becomes the minimum, and the maximum is twice the maximum ordinarily allowable for the offense. Ark. Stat. Ann. § 41-1001(2) (recodified as Ark. Code Ann. § 5-4-501(b) (1987)). Thus, where a class B felony is nor-

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[5] Arkansas' first habitual offender sentencing law was passed in 1953. 1953 Ark. Acts 228. The earlier versions of the statutes (before the 1975 Criminal Code (1975 Ark. Acts 280)) only added a fixed minimum and maximum to the possible punishment (*e.g.*, 50%). *See* Ark. Stat. Ann. § 43-2328 (Supp. 1973). The 1975 Criminal Code revision was intended to eliminate wide variations in habitual offender sentences by substantially increasing the minimum. Ark. Stat. Ann. § 41-1001 (Repl. 1977), *Commentary*. (For some reason, the 1975 Criminal Code Revision Commission's Commentaries were omitted by the publisher in the 1987 recodification.)

mally punishable by imprisonment for 5 to 20 years, an habitual offender with two or three priors is subject to imprisonment for 5 to 30 years, and an habitual offender with four or more priors can be sentenced to imprisonment for 20 to 40 years.

Habitual offender sentencing in Arkansas, as in capital cases, is bifurcated from the guilt phase. The jury determines guilt or innocence, and, if the defendant is convicted, the question of the number and nature of prior convictions is submitted to the jury for sentencing. Ark. Stat. Ann. § 41-1005 (Repl. 1977 & Supp. 1985) (recodified as Ark. Code Ann. § 5-4-502 (1987)). The prior convictions are a fact to be proved by the State beyond a reasonable doubt. Ark. Stat. Ann. § 41-1003 (Repl. 1977 & Supp. 1985) (recodified as Ark. Code Ann. § 5-4-504 (1987)); *Ply* v. *State*, 270 Ark. 554, 606 S.W.2d 556 (1980).

Juries in Arkansas are seldom given the option of finding, as with lesser included offenses, that the defendant has less than the number of priors submitted to the jury. As in this case, the jury had to find four priors and sentence him as an habitual offender or less than four priors and sentence him as a first or second offender.

As the District Court and Court of Appeals held and as the petitioner accepts (Petitioner's Brief at 9 n.2), the sentencing phase is sufficiently like a trial on fact questions that the Double Jeopardy Clause bars resentencing if the evidence is insufficient to support the verdict. *Nelson* v. *Lockhart*, *supra*, 828 F.2d at 448, relying on *Bullington* and *Burks*, *supra*). *And see Arizona* v. *Rumsey*, 467 U.S. 203 (1984) (double jeopardy bars retrial of sentencing in capital case even where the trial court made an error of law and erroneously imposed a life sentence).

SUMMARY OF THE ARGUMENT

The Court should hold that double jeopardy bars retrial when, after evidence is excluded on appeal, the prosecution would fail to convict as a matter of law on the remainder of evidence in the record. The prosecution has had its one fair opportunity to present its proof. The Court cannot consider the evidence which was excluded in evaluating the sufficiency of the evidence, particularly here when the "evidence" submitted was not evidence at all in support of the State's factual contention.

This Court has long recognized that, when there is a reversal for trial error, the government is usually free to retry the accused. If, however, the only remaining evidence that the prosecution has before the court is insufficient to support the verdict, retrial is barred because the prosecution had its "one fair opportunity to offer whatever proof it could assemble," *Burks* v. *United States*, 437 U.S. 1, 16 (1978); and it failed.

Here, the State undertook to prove a prior conviction which was pardoned and a nullity while the State was on notice that it was potentially committing error. Rather than withdraw the potential error-causing evidence, the State assumed the risk of the outcome and took the sentencing issue to conclusion.

The contention that affirmance here would require prosecutors to overtry their cases is a false issue that lacks any extrinsic support and is logically and constitutionally unsound. Prosecutors should always put their best case forward.

If the defense objects to evidence, the prosecutor and the Court are on notice the evidence is suspect. The prosecutor can put on additional evidence, if he or she has it, to cure the error and guarantee sufficiency of the

evidence on review. In close cases, additional evidence is not cumulative by definition. Also, trial judges can limit cumulative evidence. Finally, if the evidence is not there, no one is worse off by this requirement and it saves the accused an unnecessary retrial.

The State's argument here only protects lazy prosecutors. The public and the system have a right to expect that the best available case will be presented by the prosecution. Defense lawyers have to try cases all the while protecting the record. There is no reason prosecutors should not either. To reverse here would literally give the State a second chance to get the evidence it did not have before. This is precisely what the Double Jeopardy Clause was intended to prevent.

ARGUMENT

WHETHER "TRIAL ERROR" OR NOT, THE POSSIBLE FAILURE OF PROOF WAS KNOWN AT TRIAL. THEREFORE, DOUBLE JEOPARDY BARS THE STATE FROM TWICE SENTENCING THE RESPONDENT AS AN HABITUAL OFFENDER BECAUSE ITS USE OF A VOID CONVICTION WHICH HAD BEEN PARDONED MADE THE EVIDENCE INSUFFICIENT AS A MATTER OF LAW TO SUSTAIN THE SENTENCE.

A. Introduction

At the outset, it is perhaps better to state what this case is and is not. The issue is not whether double jeopardy applies to the sentencing phase of habitual offenders. The State agrees that it does. Petitioner's Brief at 9 n.9; *see Bullington* v. *Missouri*, 451 U.S. 430 (1981); *Arizona* v. *Rumsey*, 467 U.S. 203 (1984). The issue here is whether the State gets another try at sentencing respondent with four or more priors because the State could not use one of the priors it did use against him because the conviction was eliminated by a pardon. Thus,

this case gives the Court the opportunity to determine the constitutional limits of a retrial under the "trial error" exception to the Double Jeopardy Clause of the Fifth Amendment where the proof remaining in the record is insufficient to convict. This issue was left open in *Greene* v. *Massey*, 437 U.S. 19, 26 n.9 (1978), which was decided with *Burks* v. *United States*, 437 U.S. 1 (1978).

The Court should now conclude that double jeopardy does, in fact, bar retrial when, after evidence is excluded on appeal, the prosecution would fail to convict as a matter of law on the remainder of evidence in the record. The prosecution has had its one fair opportunity to present its proof which was objected to. The Court cannot consider the evidence which was excluded in evaluating the sufficiency of the evidence, particularly here when the "evidence" submitted to the jury was not evidence at all in any possible support of the State's factual contention.

The well-established principles of double jeopardy in this Court's cases compel the conclusion that Nelson cannot be resentenced because the State failed in its burden of proof.

B. Principles Of Double Jeopardy

The Double Jeopardy Clause of the Fifth Amendment provides that "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." The protection against double jeopardy is "fundamental to the American scheme of justice." *Benton* v. *Maryland*, 395 U.S. 784, 794 (1969) (*citing Duncan* v. *Louisiana*, 391 U.S. 145, 149 (1968)). As the Court stated in *Green* v. *United States*, 355 U.S. 184, 187-88 (1957):

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and

> power should not be allowed to make repeated attempts to convict an individual of an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.[6]

More recently, the court stated in *Burks* v. *United States*, *supra*, at 11:

> The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding. This is central to the objective of the prohibition against successive trials. The Clause does not allow "the State . . . to make repeated attempts to convict an individual for an alleged offense," since "[t]he constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense." *Green* v. *United States*, 355 U.S. 184, 187 (1957); *see Serfass* v. *United States*, 420 U.S. 377, 387-388 (1975); *United States* v. *Jorn*, 400 U.S. 470, 479 (1971). (footnote omitted)

As applied to trial error, *Burks* again summarized the law in a lengthy but pertinent passage; *id.* at 15-17:

> Various rationales have been advanced to support the policy of allowing retrial to correct trial error, but in our view the most reasonable justification is that advanced by *Tateo*, *supra*, 377 U.S., at 466:
>
> It would be a high price indeed for society to pay were every accused granted immunity from

[6] This passage was quoted and relied on in *Bullington* v. *Missouri*, 451 U.S. 430, 445 (1981), in holding that the same considerations apply to sentencing.

> punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction.

See Wilson, *supra*, 420 U.S. at 343, 344, n.11; *Wade* v. *Hunter*, 336 U.S. 684, 688, 689 (1949). In short, reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. As such, it implies nothing with respect to the guilt or innocence of the defendant. Rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect, e.g., incorrect receipt or rejection of evidence, incorrect instructions, or prosecutorial misconduct. When this occurs, the accused has a strong interest in obtaining a fair readjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished. See Note, Double Jeopardy; A New Trial After Appellate Reversal for Insufficient Evidence, 31 U. Chi. L. Rev. 365, 370 (1964).

The same cannot be said when a defendant's conviction has been overturned due to a failure of proof at trial, in which case the prosecution cannot complain of prejudice, for it has been given one fair opportunity to offer whatever proof it could assemble. Moreover, such an appellate reversal means that the government's case was so lacking that it should not have been *submitted* to the jury. Since we necessarily afforded absolute finality to a jury's *verdict* of acquittal—no matter how erroneous its decision—it is difficult to conceive how society has any greater interest in retrying a defendant when, on review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty.

The importance of a reversal on grounds of evidentiary insufficiency for purposes of inquiry under the Double Jeopardy Clause is underscored by the fact that a federal court's role in deciding whether a case

should be considered by the jury is quite limited. Even the trial court, which has heard the testimony of witnesses first hand, is not to weigh the evidence or assess the credibility of witnesses when it judges the merits of a motion for acquittal. [citations omitted] The prevailing rule has long been that a district judge is to submit a case to the jury if the evidence and inferences therefrom most favorable to the prosecution would warrant the jury's finding the defendant guilty beyond a reasonable doubt. [citations omitted]

Obviously a federal appellate court applies no higher a standard; rather, it must sustain the verdict if there is substantial evidence, viewed in the light most favorable to the Government, to uphold the jury's decision. *See Glasser* v. *United States*, 315 U.S. 60, 80 (1942). While this is not the appropriate occasion to re-examine in detail the standards for appellate reversal on grounds of insufficient evidence, it is apparent that such a decision will be confined to cases where the prosecution's failure is clear. Given the requirements for entry of a judgment of acquittal, the purposes of the Clause would be negated where we have to afford the government an opportunity for the proverbial "second bite at the apple." (bracketed material added; footnotes omitted; emphasis in original)

Appellate reversal of a conviction on the grounds of insufficiency of the evidence has the same effect as an acquittal: the Double Jeopardy Clause bars a retrial. *Burks* v. *United States*, *supra*, at 18. *See Tibbs* v. *Florida*, 457 U.S. 31, 41 (1982). When an accused stands acquitted of a necessary fact to support a particular sentence, retrial of the sentencing phase is barred. *Bullington* v. *Missouri*, 451 U.S. 430 (1981) (capital case). This is so even where the trial court commits an error of law that leads to an acquittal; *Sanabria* v. *United States*, 437 U.S. 54 (1978); or an erroneous finding that the highest sentence could not be imposed. *Arizona* v. *Rumsey*, 467 U.S. 203 (1984). This is also so where the trial court finds the evidence insufficient to support the conviction. *Hudson* v. *Louisiana*, 450 U.S. 40 (1987).

When there is a reversal for trial error, however, the Court recognizes that the government is usually free to retry the accused. *Greene* v. *Massey*, 437 U.S. 79, 26 (1978); *Burks*, *supra*, at 15-16; *United States* v. *Tateo*, 377 U.S. 463, 465 (1964). If, however, the only evidence the prosecution has before the appeals court is insufficient to support the verdict, retrial is barred because the prosecution had its "one fair opportunity to offer whatever proof it could assemble"; *Burks*, *supra*, at 16; and it failed. As noted by Justice Brennan in his concurrence in *Justices of Boston Municipal Court* v. *Lydon*, 466 U.S. 294, 321-22 (1984):

> [W]hen a defendant challenging his conviction on appeal contends both that the trial was infected by error and that the evidence was constitutionlly insufficient, the court may not, consistent with *Burks* v. *United States*, ignore the sufficiency claim, reverse on grounds of trial error, and remand for retrial. Because the first trial has plainly ended, "retrial is foreclosed by the Double Jeopardy Clause if the evidence fails to satisfy the [constitutional standard for sufficiency]. Hence, the [sufficiency] issue cannot be avoided; if retrial is to be had, the evidence must be found to be legally sufficient, as a matter of federal law, to sustain the jury verdict."

(*Quoting Tibbs* v. *Florida*, 457 U.S. 31, 51 (1982) (White, J. dissenting)).

C. This Is No Mere Trial Error—It Involves A Failure Of Proof As A Matter Of Law Undertaken By The State With Knowledge Of The Consequences.

The State argues, as it must, that the use of the pardoned conviction against respondent was a mere "trial

error." Thus, it argues the sufficiency of the evidence should not be considered on appeal.

1. A pardoned conviction cannot even be considered as "evidence" in Arkansas. In the cases cited in the Petitioner's Brief at 11-12, the courts there would not consider the evidence in the record without the evidence they excluded in determining the sufficiency of the evidence for retrial. In those cases, be it hearsay evidence or whatever, at least it could be argued there was "evidence" by which a fact could be proved. *Cf. Oldmstead* v. *United States*, 277 U.S. 438 (1928) (discussing what is "evidence").[7] A conviction once pardoned in Arkansas is not a conviction, so there can be no "evidence" of a valid conviction.

In the case of a pardoned prior conviction, a pardon is not "evidence" in Arkansas;[8] it is a nullity, it is nothing. The slate is wiped clean on that conviction. *Duncan* v. *State*, 254 Ark. 449, 451, 494 S.W.2d 127, 129 (1973). *Accord: Ex parte Garland*, 4 Wall. 333, 380 (1866);[9] *Knote*

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[7] *And see* 29 Am.Jur.2d, *Evidence* § 1 (1967):

"Generally, it may be said that the term 'evidence' in the legal acceptation of the word imports the means by which any matter of fact the truth of which is submitted to investigation may be established or disproved."

See also 3 Blackstone's Commentaries *367; 1 Wigmore on Evidence § 1 (Tillers rev. 1983); Black's Law Dictionary 498 (5th ed. 1979).

[8] The jurisdictions are divided in holding that pardoned priors may or may not be used in habitual offender proceedings. This turns on a construction of the applicable statutes. *See* 39 Am.Jur.2d, *Habitual Criminals and Subsequent Offenders* § 13 (1968).

[9] "A pardon reaches both the punishment proscribed for the offense and the guilt of the offender; and, when the pardon is full, it releases the punishment and blots out of evidence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense."

v. *United States*, 95 U.S. 149, 153 (1877).

So, under the State's argument we are not to consider the sufficiency of evidence even though part of that evidence is not "evidence"? Are we supposed to pretend that the *State* made a mere "trial error" here and blink our eyes to the reality that the pardon could never be used to enhance a conviction? The trial court may have admitted the questioned evidence, but it was, after all, the State which offered it in the face of Nelson's protestations that he was pardoned. Rather than seek to prove some other conviction, the prosecutor moved unflinchingly ahead with his defective proof.[10]

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[10] *See* the district court's opinion, 641 F.Supp. at 186:

"The defect in the state's evidence could have been avoided had the prosecutor researched the petitioner's record more thoroughly. This investigation would have revealed that the defendant had been pardoned with respect to one of the prior convictions upon which the prosecution sought to rely for enhancement. In any event, after the petitioner claimed in open court that the conviction had been pardoned, the prosecution was clearly put on notice that there might be some risk in relying on this conviction's validity. At this point he had another reason to check the matter out or he might have substituted one of the petitioner's other convictions, or introduced evidence of a fifth prior conviction to provide a margin of error should the questionable conviction prove defective. The government did not take these precautions, however, and the Double Jeopardy Clause of the Constitution now denies it a second opportunity to try out the issue."

See further the Eighth Circuit's opinion, 828 F.2d at 449-50:

"While the conviction in question was indeed submitted to the jury, Nelson had not engaged in any misconduct. For example, [he] did not deceive the court or the prosecutor as to the status of the pardoned conviction. In fact, he did all the could have been expected to do to make he court and prosecutor aware of his pardon. Responsibility for the evidence submitted remained with the prosecution." (bracketed material added)

2. The failure here transcends mere "trial error." This pardoned conviction could not and should not have been used at all. The law in Arkansas was well settled at the time. The State assumed the risk of this outcome when it went forward with its defective proof when it was on notice of the pardon rather than doing the right thing and withdrawing that conviction from the jury's consideration.

The State's cavalier attitude toward respondent's rights in this case did not end with the trial. It continued through the state appellate process and up until the time the district court directed the State to look and see if Nelson was, in fact, pardoned. This conduct was fundamentally unfair and abused the respondent and the appellate process.[11] While the prosecutor was too lazy to seek to prove another conviction or to withdraw the pardoned one, the State on appeal was too lazy to pick up the telephone or take the three-minute walk over to the Secretary of State's office to check on whether Nelson had been pardoned until Judge Eisele requested it in 1985. The State was content to rely on the fact that Nelson's "bare assertion" he was pardoned was likely going to be

[11] Respondent initially planned to cross-petition for certiorari on the issue of prosecutorial misconduct because the State spent three years denying that respondent was pardoned, unnecessarily extending his incarceration. Respondent determined, however, that this issue had necessarily been acted on by the district court, and since it was also mentioned and ruled on by the Eighth Circuit, respondent is in the position of being able to advance this argument to defend the judgment because it does not expand his relief. *Whitley* v. *Albers*, 475 U.S. 312 (1986); *Trans-World Airlines, Inc.* v. *Thurston*, 479 U.S. 111 (1985); *United States* v. *New York Telephone Co.*, 434 U.S. 159 (1977).

Since prosecutors, including the Attorney General on appeal, are immune, what other remedy does Nelson have?

insufficient to gain relief in the Arkansas appellate courts.[12]

Thus, the proof of priors was a fundamental failure of proof, and the State's conduct was fundamentally unfair. This is not just excluding evidence on appeal—if everybody had done their jobs here, Nelson simply *could not* have been proved to have four priors at his sentencing.

D. The State's Policy Argument About The Risk Of Overtrying Cases To Avoid Insufficiency Of Evidence Arguments Is Without Basis And Should Be Rejected. Moreover, Testing The Argument Proves Respondent's Point.

1. Since some courts and commentators have accepted the argument put forward by the State, one would assume there apparently is some facial appeal to the State's argument that the holding below would require the prosecution to overtry criminal cases and put on unnecessary and cumulative evidence to insure the sufficiency of the evidence on appeal should some ruling of the

[12] As all Arkansas criminal practitioners know, bare allegations of violations of rights are insufficient to obtain reversal or post-conviction relief in Arkansas. Without the pardon attached and a record reference to where it was used, the State had to know that Nelson would not prevail. All the State had to do was say that he has only generally alleged it and not proved it.

This case lays bare a fundamental flaw in how the Arkansas criminal justice system works: Form is usually more important than substance. A man in prison, obviously disadvantaged, must spend three years litigating a simple uncontroverted fact which the State assumes it has no duty to explore even though it would obviously be easier for the State to have ascertained this fact than respondent. Everybody in this case failed to do their job: defense counsel, the prosecutor, the trial judge, the appellate courts, and the Attorney General. The system woefully failed to produce a just result.

trial court admitting evidence at trial be reversed on appeal. So, as the argument goes, the prosecution would waste everyone's time and money putting on proof that trial tactics may have counseled against only to protect the sufficiency of the evidence on appeal. This would thus be prejudicial to the efficient administration of Justice. Thus, the prosecution is entitled to rely on the trial court's evidence rulings in deciding when to rest its case. In case of reversal where a key piece of evidence necessary to sustain the conviction is ruled out of evidence by the appellate court, the reversal is considered only one for "trial error," and the sufficiency of the evidence without that inadmissible evidence will not be considered.[13] This is considered by some influential commentators as "the prevailing and better view." Thus, "[i]n the language of *Burks*, the prosecution in such circumstances would not have been given 'one fair opportunity' to make its proof." 3

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[13] *See, e.g., United States* v. *Gonzalez-Sanchez*, 825 F.2d 572, 50[illegible] n.57 (1st Cir.), *cert. denied*, 108 S.C.t. 510 (1987):

"Of course, if the evidence is insufficient without the improperly admitted evidence, the conviction must be reversed because the error of admission was necessarily prejudicial error. For purposes of determining whether the double jeopardy clause prevents a retrial, however, we must consider all the evidence that was submitted before the jury. *United States* v. *Marshall*, 762 F.2d 419, 423 (5th Cir. 1985); *United States* v. *Tranowski*, 702 F.2d 668, 671 (7th Cir. 1983), *cert. denied*, 468 U.S. 1217, 104 S.Ct. 3586, 82 L.Ed.2d 884 (1984); *United States* v. *Harmon*, 632 F.2d 812, 814 (9th Cir. 1980). A contrary rule would force us to speculate as to what additional evidence or alternate theories the government could have brought forward had the trial court properly excluded the inadmissible evidence, *Harmon*, 632 F.2d at 814. Or, it would force the government to "overtry" its cases—to introduce all its available evidence, however redundant—to ensure that it could retry the defendant if some of its evidence is held on appeal to be inadmissible. *Tranowski*, 702 F.2d at 670."

Respondent's brief at 11-12 cites numerous other cases in accord.

W. LaFave & J. Israel, Criminal Procedure § 24.4(b), at 91 (1984). While this argument may sound good in the abstract, there is no extrinsic evidence anywhere to support it and it is logically and constitutionally unsound. It is also simply inapplicable to the realities of criminal trial practice, and it totally ignores the realities of habitual offender cases where lengthy sentences are always sought and almost always obtained.

2. Criminal trials are significant events both to the accused and to society as a whole. They are not games of blindman's bluff. This is all implicit in the double jeopardy protection. *See* Point B, *supra*. The prosecution has caused[14] an individual to be charged with a crime and has then put that person on trial and in jeopardy of being convicted and imprisoned or even executed. The case comes to trial for the purpose of deciding, as best as can be done within the confines of the rules of evidence and procedure, and despite the difficulty of evaluating the credibility of witnesses, where the truth lies, whether the defendant is guilty, and to what degree the guilty are to be punished. The prosecution of necessity puts on its best case. No less should be expected. After all, the prosecutor's duty is to convict the guilty. The prosecutor always carries the burden of proof to prove the defendant guilty beyond a reasonable doubt of all elements of the crime charged. *See, e.g.*, Ark. Code Ann. § 5-1-111 (1987) (formerly Ark. Stat. Ann. § 41-110 (Repl. 1977)); *In re Winship*, 397 U.S. 355, 364 (1970) (due process clause

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[14] Criminal charges in Arkansas are brought by indictment or information. Ark. Const., Amendment 21, § 1 (1874). Practically all cases (over 99.9%) are filed by the prosecutor in Arkansas.

In indictment jurisdictions, the prosecutor is still the one to submit the case to the grand jury for its action.

requires proof beyond a reasonable doubt in criminal cases). No prosecutor quits proving the government's case once a mere prima facie case has been established, assuming there is other evidence, for fear of a directed verdict or acquittal. Conscientious prosecutors would put on everything they have that bears on the issue of guilt (short of unnecessary and cumulative evidence) in an effort to insure conviction and a proper sentence. Not only do they want a conviction, if justified, they want the best sentence the circumstances warrant.

As the prosecutor offers evidence in a criminal case, the defense may or may not object. Arkansas is not a plain error jurisdiction, so a specific objection is required.[15] Objections are required so the prosecution and trial court will be on notice that there is a potential problem with the evidence such that it can be cured if they choose to do so before the case is submitted to the finder of fact.[16]

At the close of the case, the defendant sometimes will move for a directed verdict to challenge the sufficiency of the evidence. This is required in Arkansas to challenge the sufficiency of the evidence on appeal. *See, e.g., Walker* v. *State*, 240 Ark. 441, 399 S.W.2d 672 (1966). If there is a prima facie case where there is sufficient evidence in the record on which the jury could conclude that each element has been proved, the motion will be denied and the case will go to the jury. *See, e.g., Nichols* v. *State* and *Ravellette* v. *State, infra*. In jury sentencing states such as Arkansas, the jury will determine guilt and sentence based on the evidence in the trial record. (In capital[17] and

[15] J. Hall, Trial Handbook for Arkansas Lawyers § 3.19, at 69 (1986).

[16] *Id.* § 24.2, at 373.

[17] Ark. Code Ann. § 5-4-601 *et seq.* (1987).

habitual offender cases[18] in Arkansas, the guilt and sentencing phases are bifurcated.)

3. The State's cumulative evidence argument must fail. If the government's case is so close that ruling one piece of evidence out can make the difference, then further evidence on that point is not cumulative by definition. Once evidence becomes cumulative, of course, it can be ruled out by the trial court.[19]

A prosecutor who withholds evidence of guilt that is not merely cumulative, as a matter of trial tactics or for any other reason, is not serving the jurisdiction he or she works for. It also flies in the face of everything we know about prosecutors. What if there are three witnesses to a crime and the prosecutor only puts on one? If the jury for some reason decides that witness is not credible, the accused may erroneously be acquitted. In addition, why would any prosecutor want to hinge a case on one witness when others are available, and then have to answer for it in closing argument? (It would be reversible error anywhere to tell the jury in summation that there was additional evidence available but not presented.[20])

This applies with equal or greater force to habitual offender sentencing. If the accused has eight prior

[18] Ark. Code Ann. § 5-4-504 (1987) (formerly Ark. Stat. Ann. § 41-1003, *supra*).

[19] Trial judges have the discretion to rule out cumulative evidence. F.R.Ev. 403; U.R.Ev. 403; 6 Wigmore on Evidence § 1907 (Chadbourn rev. 1976). If the prosecutor offers any, at least we all know it was there. The prosecutor can also make an offer of proof as to what was cumulative if it is ruled out. F.R.Ev. 103(a)(2); U.R.Ev. 103(a)(2).

[20] *See, e.g., Hughes* v. *State*, 154 Ark. 621, 243, S.W. 70 (1922); *Shipp* v. *State*, 241 Ark. 120, 406 S.W.2d 361 (1966). Cases from all other jurisdictions are collected in Annot., 90 A.L.R.3d 646 (1979).

offenses, why should a prosecutor stop with four (the highest level in Arkansas under § 41-1001)? The prosecutor can also show "the nature of the previous convictions and the date and place thereof" for the benefit of the jury under § 41-1005.[21] For example, four felony shopliftings which occurred at the same shopping center on the same date twenty years earlier may not cause a jury great consternation at sentencing if there was no other criminality. If, however, the accused has several more significant felonies since then, what rational prosecutor would not put them all into evidence so the jury would get a true picture of the criminal record of the defendant?[22] It would usually mean the difference between the minimum and the maximum sentences.[23] "Overtrying" that part of the case is simply impossible.

There is nothing wrong with requiring prosecutors to prove their best case, be it at the guilt phase or the sentencing phase. Society, our system of justice, and the requirements of the Double Jeopardy Clause should expect that from prosecutors. That is also what effective trial advocacy is all about. To argue that prosecutors

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[21] This is the rule under both the pre- and post-1981 habitual offender sentencing systems. Under both, the jury would know exactly what the accused was previously convicted of if the parties deem it important.

[22] As an officer of the Court, respondent's counsel states that, as a deputy prosecutor and head of the career criminal division of the prosecutor's office in Little Rock in 1978-79, it was office policy to present every valid prior conviction before the jury to support a maximum possible sentence.

[23] It should be noted here that respondent got the minimum possible sentence for the four priors used against him, and the record is not clear whether any of the other two 1960 convictions can be used. It appears they cannot. *See* note 1, *supra*.

would be forced to overtry their cases is to ignore reality. If the proof is there, it should go in or at least be offered; if it is not there or is cumulative, it is not offered. If it is cumulative, surely some of the other evidence in the record will overcome the insufficiency of the evidence argument. Moreover, it is too convenient for a prosecutor to argue in an appeal that he or she would have offered other evidence if it was known that what was originally offered was inadmissible. Since that is improper trial argument, it should be improper appellate argument if there is nothing in the record to support it. *See* note 20, *supra*.

In addition, prosecutors are always put on notice, as here, that the evidence may be inadmissible by virtue of the defense objection. It is not as if the prosecutor does not know what is going on at trial and what the defense seeks to do by challenging the evidence. Trial lawyers are presumed to know the rules of evidence. When the defense objects, one would assume that a conscientious prosecutor would try to bolster the record with other evidence, if any exists, to cure error and obtain a conviction. The prosecutor may then have enough in the record that any error in admitting the challenged evidence is harmless beyond a reasonable doubt. *Chapman* v. *California*, 386 U.S. 18 (1967); *United States* v. *Hasting*, 461 U.S. 499 (1983). In any event, other substantial evidence may persuade the appeals court that the trial court did not abuse its discretion in admitting the challenged evidence under F.R.Ev. 403 or U.R.Ev. 403. At the minimum, there would still be other evidence in the record to create a jury question or retrial.

Finally, one must also ask: *what other evidence?* Respondent agrees that appellate courts cannot speculate as to what additional evidence or theories the prosecution had, as the First Circuit said in *United States* v. *Gonzalez-*

Sanchez, note 13, *supra*. If there is nothing in the record which tells the appellate courts and the accused what that other purported evidence is, it is entirely proper and constitutionally required that we assume that evidence does not exist because it was not offered to begin with. Juries are not permitted to speculate; *Nichols* v. *State*, 280 Ark. 173, 655 S.W.2d 450 (1983); *Ravellette* v. *State*, 264 Ark. 344, 571 S.W.2d 433 (1978); and appellate courts should not either. To do so would violate the Double Jeopardy Clause and likely the Sixth Amendment right of confrontation by the accused as well. The prosecution would not be harmed by such a requirement. If the government had no additional evidence at trial, it is no worse off if the case is reversed. The accused is, however, because the government now has a second chance to fill the void with "new" evidence, if it can.

4. The State's argument that it should not have to overtry its cases to protect the record on appeal only serves to protect the lazy and unprepared prosecutor. After all, defense lawyers are required to protect the record for appeal or be accused of being, and maybe found, constitutionally ineffective at trial. Why do prosecutors uniformly argue, as the State's authorities obviously suggest, that they have no such obligation? This Court should hold that they *do* have such an obligation under the Double Jeopardy Clause of the Fifth Amendment. To hold otherwise would enable an unprepared prosecutor, with the help of an overly protective trial judge, to, for example, introduce a piece of obviously inadmissible evidence in order to at least get a case to the jury, even though everybody knows the case will likely be reversed on appeal, and then cure the evidentiary insufficiency on retrial. In that situation, the prosecutor "has been given one fair opportunity to offer whatever proof it could assemble"; *Burks* v. *United States*, *supra*, 437 U.S. at 16; and retrial would, in fact, violate the Double Jeopardy Clause.

It is pure fiction to argue as do LaFave and Israel, *supra*, that the prosecutor has been denied that "one fair opportunity" when he or she relies on the trial court's rulings or defense counsel's ineffectiveness. When the trial begins, the prosecutor announces "Ready for trial," and he or she is expected to put on the best case possible. That is the essence of the government's "one fair opportunity to offer whatever proof it could assemble." And if that evidence is not enough for a jury, a trial judge or an appellate court, the Double Jeopardy Clause will bar a retrial.

What the State clearly is asking for is a "second bite at the apple." It had its first bite in 1982. It could have called the Circuit Clerk on short notice to fill the potential void in its proof of prior convictions if it could, but it chose not to. It could have withdrawn the defective conviction, but it did not do so. Now it asks for what is nothing but a "second fair opportunity to offer whatever proof it could assemble." That is exactly what the Double Jeopardy Clause was intended to prohibit.[24]

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[24] One other matter deserves note: Resentencing Nelson as with more than one prior conviction is not before the Court. The jury that sentenced Nelson was not given the option of finding whether he had any number of priors less than four other then to acquit him outright for failure to prove priors (T. 77-78), and neither side has ever requested "lesser included offense" treatment. On this state of the record, the only alternative the jury had, if this prior were known to be invalid at trial, *would have been to acquit him*. Therefore, Nelson may not be sentenced at all.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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